

G. Program Policies

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Note: The FDIC *Guide for Outside Counsel* (“Guide”) has been superseded by the Outside Counsel Deskbook. Therefore, all references to the “Guide” are references to the Outside Counsel Deskbook.

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SELECTION AND RETENTION OF OUTSIDE COUNSEL

This establishes Division-wide policies and procedures for the utilization of in-house resources, including Legal Services Offices (LSOs), and for retaining outside counsel. These procedures apply to all sections of the Legal Division and must be exercised consistent with the most recent issuance of the Delegations of Authority from the Board of Directors to the Legal Division for retaining and paying outside counsel. These procedures may be modified, as necessary, with authorization from the General Counsel.

Use of In-House Legal Staff and Retention of Outside Counsel

The Legal Division will utilize in-house staff to the extent practicable to provide legal services and support to the entire Corporation in all legal matters including, but not limited to, litigation, transactional, corporate, open bank, appellate and professional liability matters. The management of the Division will assess the number and type of staff which can be efficiently utilized in a cost-effective manner to support the conduct of legal services in-house. All reasonable efforts should be undertaken to staff matters in-house before retaining outside counsel. Such efforts include consulting with the LSO on assigning any matter within the geographical area of an LSO in accordance with the May 21, 1996 memorandum from the General Counsel entitled "Assignment of Cases to Legal Services Offices," a copy of which is annexed to this PM.

Where the Division does not have sufficient resources or particular expertise, outside counsel may be retained. The following factors should be considered in determining whether outside legal services should be obtained:

1. Staff Workload -- A matter should be referred to outside counsel only if it is not possible to utilize sufficient in-house staff from any Legal Division source, including an LSO for the relevant geographical area. Where the referring office and any LSO does not have sufficient in-house staff, the matter may be referred to outside counsel. Even under these circumstances co-counsel relationships should be utilized if possible in order to augment staff resources rather than substitute for them.
2. Timeliness -- If staff attorneys in the referring office are not able to respond in a timely fashion to court-ordered or other deadlines and the matter falls outside the geographical area of an LSO, outside counsel should be retained for the particular matter.
3. Cost Effectiveness -- All Service Centers, Regional offices and appropriate Washington, D.C. sections will review ongoing legal matters with outside counsel to determine which matters are appropriate to bring in-house. Because the LSOs have

demonstrated that they can provide efficient, cost-effective legal services, whenever legal services are required in a geographical area served by an LSO, the LSO must be consulted as to whether a referral to it would be appropriate. Any matter outside of the geographical area of an LSO which may be handled economically and effectively by FDIC staff attorneys in the referring office should likewise be handled in-house.

4. Staff Expertise --The Legal Division will continue to maintain expertise in all areas of financial institution law, especially with respect to issues unique to the FDIC. Doing so not only increases the range of matters which may be handled by Legal Division staff but also enhances the staff's ability to effectively manage outside counsel. The LSOs are skilled in handling all types of legal matters completely in-house. Therefore, unless a matter within the geographical area of an LSO cannot be appropriately handled by the LSO, the matter should not be sent to outside counsel. Within Service Centers, Regional offices, LSOs and Washington, D.C. sections, assignment of matters should be made in a manner that enhances staff expertise. If a matter is not within the staff's expertise, it should be referred to outside counsel.
5. Case/Matter Type -- FDIC attorneys should be able to handle both complex and routine matters. Therefore, before retaining outside counsel, staff development needs should be considered. This preserves the Division's flexibility to decide whether to use in-house or outside counsel.
6. Geographic Location -- The geographic location of the asset or venue of the court proceeding should be considered.

Selecting Outside Counsel

If it is necessary to refer matters to outside counsel for legal services, selection of counsel will be made in a manner to ensure the highest quality of representation at the most economical cost, while promoting the use of minority- and women-owned firms. To that end, the minority and women coordinator should participate in any final decision on the selection and retention of outside counsel.

The selection of outside counsel may be accomplished using primarily two methods: non-competitive contracting (or sole-sourcing) or competitive contracting. A non-competitive contract for legal services is defined as the award of a legal referral when only one private attorney, law firm or service provider is considered. While the preferred method of selecting outside counsel is through competitive contracting, circumstances may exist when competition is impossible or impractical. Those circumstances include, but are not limited to, time sensitive matters (e.g., insufficient time to conduct competition in order to meet court-ordered or other deadlines), matters in which only one law firm maintains specific knowledge of that matter, and confidential matters.

Competitive contracting is defined as a method in which not fewer than three firms are considered for each matter. In addition, certain circumstances may exist that represent a continuation of work on a matter by the same individual(s) or law firm(s). These circumstances are deemed to be competitive contracting for the purposes of this policy, and they include, but are not limited to, matters handled by inherited counsel, matters handled by outside counsel that change their tax identification numbers or reorganize, or matters requiring transfer as a result of the dissolution of a law firm.

In the case of either non-competitive or competitive contracts for legal services, the FDIC List of Counsel Available (LCA) provides the major source for identifying firms for consideration. Although non-LCA firms may be considered, such firms must satisfy the requirements for inclusion on the LCA and execute a Legal Services Agreement (LSA) before the engagement begins. These requirements are described in the Guide for Outside Counsel.

The following factors constitute the basis for selecting one firm from among those considered for retention. No one factor is dispositive. Rather, all factors contribute to the final decision of which firm to retain or whether to continue the retention of inherited counsel.

1. Cap Policy -- Are FDIC payments to the firm in excess of or approaching the limits established for eligibility to receive referrals of new matters?
2. Capacity -- Does the firm have the numbers, as well as type, of professional and support staff to perform the work anticipated? Does the firm's staffing allow it to adapt to shifts in the amount and type of staff needed during the course of the case?
3. Cost -- In comparison to other firms available, are the firm's rates competitive, offering the best possible service for the lowest available cost? Note, as stated in the Guide for Outside Counsel, the FDIC expects to receive a discount from outside counsel's usual rate structure. Furthermore, competitive bidding and alternative fee arrangements may be employed for routine representations.
4. Expertise -- Does the firm's experience and knowledge coincide with the type of legal work to be performed? Does it generally understand issues related to representing the FDIC as a federal agency? Note that this information is contained in law firm's Prospective Law Firm Data Request, which is required as part of its LCA application.
5. Geographic Location -- Is the firm proximate to the geographic area in which the matter arises or, if appropriate, to the FDIC office requiring legal service? Localizing firm selection will enhance staff's ability to monitor case status and minimize travel and expenses. Moreover, the Division seeks diverse representation in order to avoid over-reliance on any single firm or group of firms in a geographic area.

6. Lack of Conflicts -- Has the firm conducted a detailed review for and scrupulously reported any existing or potential conflicts of interest? In addition to directly questioning the firm, staff should review the firm's conflict of interest disclosure sheet submitted as part of its LCA application. Note that any conflicts of interest (except those waived when the firm was added to the LCA or when it entered into an LSA) must be submitted to the FDIC Outside Counsel Conflicts Committee for a waiver request before any new work or continuation of work is permitted.
7. Minority/Women Information -- Is there a minority or woman-owned firm available for retention? If not, has the majority-owned firm agreed to assign FDIC work to its minority and women attorneys and paraprofessionals or to joint venture or co-counsel with a minority or woman owned firm? Has the Legal Division minority and women outreach coordinator in the Legal Division office selecting outside counsel been consulted for an MWOLF referral?
8. Reputation -- If the firm has previously worked for the FDIC, does it have a verifiable reputation for competence, integrity, cost effectiveness and cooperativeness? Results of staff evaluations and OIG audits of the firm, if available, should be considered.

Documenting Selection and Retention of Outside Counsel

Both the decision to refer a matter to outside counsel and the choice of counsel are to be documented in writing. The form used for documentation may be defined by the Associate General Counsel, Assistant General Counsel, or Regional Counsel, as appropriate, for each branch, section or location within the Division and may vary depending on the nature of the work.

If the matter falls within the defined geographical area of an LSO and the matter is referred to that LSO, the following information should be included:

1. Bank or thrift name, location and financial institution number;
2. Type of matter and any particular expertise required; and
3. Signature of appropriate senior manager indicating approval of matter to the LSO.

If the matter is to be referred to outside counsel, the following information should be included:

1. Bank or thrift name, location and financial institution number;

2. Basis for referring to outside counsel, in accordance with the section of this policy entitled "Use of In-House Legal Staff and Retention of Outside Counsel" (NOTE: If the matter falls within the geographical area of an LSO, a specific reason for referring the matter to outside counsel rather than the LSO must be given);
3. Type of matter;
4. Type of referral (i.e., competitive or non-competitive);
5. If non-competitive, the identity of the firm and the basis for not competing;
6. If competitive, the identity of firms considered for retention and the basis for proposing retention of the subject firm, in accordance with the section of this policy entitled "Selecting Outside Counsel," including a summary comparison of each of the three or more firms considered, with the exception of those circumstances that represent a continuation of work on a matter; and
7. Signature of a senior manager with the appropriate delegated authority, indicating approval of the firm proposed and the basis for the proposal.

Internal Controls

The purpose of the internal control mechanism is to ensure compliance with all aspects of the Selection and Retention of Outside Counsel Policy. Legal Division branches may elect to supplement these requirements.

For non-competitive contracting, each Deputy General Counsel will designate either senior Legal Division manager(s) within the Legal Division branch, section, or location or assign this responsibility to the Legal Services Committee ("LSC"), if one is established, to ensure compliance with all aspects of the Selection and Retention of Outside Counsel Policy. The designated senior Legal Division manager(s) or the LSC is required to sign the appropriate documentation if the documentation is in compliance with all aspects of the Selection and Retention of Outside Counsel Policy.

For competitive contracting, each Deputy General Counsel will institute one of the following internal control mechanisms:

- (1) Designate senior Legal Division manager(s) to ensure compliance with the Selection and Retention of Outside Counsel Policy within the Legal Division branch, section, or location. This official is required to sign the appropriate documentation if the documentation is in compliance with all aspects of the Selection and Retention of Outside Counsel Policy; or
- (2) Create a LSC to ensure compliance with the Selection and Retention of Outside Counsel Policy within the Legal Division branch, section, or location. The LSC must be comprised of no less than three Legal Division staff, selected by the Associate General Counsel, Assistant General Counsel, or Regional Counsel. The LSC is required to sign the appropriate documentation if the documentation is in compliance with all aspects of the Selection and Retention of Outside Counsel Policy.

Regardless of which internal control procedure is used, each Legal Division office that utilizes outside counsel shall designate a minority and women outreach coordinator (“Outreach Coordinator”). The Outreach Coordinators are Legal Division staff who perform outreach activities for the Minority and Women Outreach Program (“MWOP”), and act as liaison between the FDIC and the public on MWOP issues. Outreach activities include the identification of MWOLFs and minority and women attorneys in majority-owned firms who seek to provide legal services to the FDIC. Outreach Coordinators also distribute information concerning MWOLFs and minority and women attorneys in majority firms to Legal Division staff, and provide the appropriate forms for use by MWOLFs and minority and women attorneys seeking to represent the FDIC. The Outreach Coordinators work in concert with the Outreach Coordinator in Washington.

Prior to retention of outside counsel, whenever practicable, the designated senior Legal Division manager(s) or the LSC must, at a minimum, review the following documentation to satisfy all internal control requirements:

- (a) Documentation which addresses the factors outlined in the first section of this policy, entitled “Use of In-House Legal Staff and Retention of Outside Counsel”;
- (b) In the case of non-competitive contracting, documentation which states why one law firm was considered; or in the case of competitive contracting, documentation which states the three law firms that were considered or which states that the matter represents a continuation of work, and addresses the factors outlined in the second section of this policy, entitled “Selecting Outside Counsel”;
- (c) Demonstrate that the referral is being made in accordance with authority set forth in the Delegations of Authority.

December 16, 1996

[Attachment to Selection and Retention of Outside Counsel]

ASSIGNMENT OF CASES TO LEGAL SERVICES OFFICES

The Legal Services Offices were created to provide legal services “in-house” within defined geographical areas. Within their geographical areas, the LSOs provide a full range of litigation, bankruptcy, and other legal services for all branches of the Legal Division and all client divisions of the FDIC. LSOs can assist in legal analyses, litigation and bankruptcy matters involving, among other issues, FDIC special powers and defenses, failed bank employee benefits and ERISA, post-judgment collection proceedings, the Crime Control Act, fraudulent conveyance claims, foreclosures, tax-related disputes, representation and warranty breaches, contracts and many more. The LSOs have also handled appellate cases, Title VII and other employment related matters. The Corporate and Special Litigation Section in Washington, D.C. also has attorneys skilled in many of these areas and will hereafter be treated as an LSO in addition to its existing responsibilities. The scope of the LSOs is now being expanded to include legal services for the entire FDIC, in addition to the liquidation work which has been the focus of LSOs historically. The LSOs are well-versed in all types of litigation matters and can cost-effectively serve the needs of the Legal Division and the Corporation.

No outside counsel should be retained in a geographical area served by an LSO without first consulting with the LSO to determine whether it can provide legal service for the matter. In order to assure effective utilization of resources, if your office or another division of the FDIC requires counsel in the geographical areas served by the LSOs, for matters which previously would have been referred directly to outside counsel, you or your staff attorney should contact the Managing Attorney for the LSO responsible for that geographical area. For matters which require coordination or referral to a specific substantive Division section (such as PLS or Appellate matters and other substantive matters set forth in Appendix C of the FDIC’s Guide for Outside Counsel), you or your staff attorney should first coordinate with the appropriate Assistant General Counsel (AGC). The Managing Attorney for the LSO will review the matter with you and with any appropriate AGC to determine whether the LSO can provide quality, timely and cost effective services on the matter. Of course, attorneys in other groups will still be called upon from time to time to appear in court for specific cases where their expertise is appropriate.

In order to increase the in-house capacity of the Legal Division, headquarters managers are encouraged to consider utilizing the New York and LA LSOs and appropriate service centers for work that might be assigned to D.C. based staff in order to free that staff to handle other matters in-house.

Cases currently handled by outside counsel within the geographical areas of the LSOs should be reviewed for possible transfer to the LSOs. Please coordinate with the LSO Managing Attorney in the review and transfer of appropriate cases currently handled by outside counsel.

The LSOs provide a full range of legal services in the state and federal courts within the following geographical areas:

LSO**Service Area****Los Angeles LSO**

John Wessling
Counsel (Section Chief)
523 West Sixth Street, Suite 240
Los Angeles, CA 90014
(213)955-6003

Los Angeles
Riverside
San Bernadino and
Ventura Counties
in California

New York LSO

Marguerite Sagatelian
Managing Attorney
452 Fifth Avenue, 16th Floor
New York, NY 10018
(212)704-1366

Bronx, Queens
Kings, New York
Richmond, Nassau,
Suffolk, Westchester
and Rockland
Counties of New
York, the entire
state of New Jersey
and eastern
Pennsylvania

-and-

Newport Tower
525 Washington Boulevard, 21st Floor
Jersey City, NJ 07310

Washington, D.C. LSO

Thomas A. Schulz
Assistant General Counsel
550 17th St. NW
Washington, D.C. 20429
(202) 736-0520

Washington, D.C.,
Virginia and
Maryland

Relationship With LSOs

In order to fulfill the LSO purpose of providing the highest quality legal services to the FDIC, it is essential that your office coordinate closely with the LSOs in serving the needs of all divisions of the FDIC. When a matter is assigned to an LSO, the LSO attorney will be responsible for coordinating with and contacting the assigned client representative directly, or an attorney assigned by your office to the matter. In the latter case, the LSO attorney will coordinate and take direction from your assigned attorney on matters of strategy and case

direction. Of course, as would outside counsel, the LSO attorney will exercise his or her judgment in recommending alternative strategies or direction for the matter. Once again, coordination between any assigned attorney and the LSO attorney is essential.

Billing Information

A matter that is referred to an LSO should be entered on CMS or RLIS as appropriate. The LSOs have the following CMS identifications:

Los Angeles LSO	LAWFIRM ID: ATTS 206
New York LSO	LAWFIRM ID: ATTS 001
Washington LSO	LAWFIRM ID: (to be provided)

Attorneys and paralegals in LSOs keep track of their time through computer timekeeping software. Fee bills can be generated on a per matter basis. LSO bills will not actually be paid, except by outside servicers. The amounts of bills, however, may be entered on CMS for tracking purposes.

If you or anyone in your office have any questions or experience any problems with the handling of a referred matter or with LSO staff, please communicate with the appropriate LSO Managing Attorney or Assistant General Counsel. Please distribute a copy of this memorandum to all attorneys in your office. These policies are essential to maximize the FDIC's utilization of in-house resources and minimize outside counsel expenses. If you have any questions or further comments, please contact me.

May 21, 1996

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12 C.F.R. PART 361
MINORITY AND WOMEN OUTREACH PROGRAM -- CONTRACTING

Sec.

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Authority: 12 U.S.C. 1833e.

Source: 57 FR 15004, Apr. 24, 1992, unless otherwise noted.

§ 361.1 Purpose.

(a) The purpose of the FDIC Minority and Women Outreach program, (“MWOP” or “Program”) is to ensure that firms owned by minorities and women are given the opportunity to participate fully in all contracts entered into by the FDIC.

(b) This part is issued by the Office of Equal Opportunity (“OEO”). Authority is derived from the Financial Institutions Reform, Recovery, and Enforcement Act (“FIRREA”), of 1989, title XII, section 1216(c), which requires the FDIC to prescribe regulations establishing and overseeing a minority outreach program ensuring inclusion, to the maximum extent possible, of minorities and women, and entities owned by minorities and women, including financial institutions, investment banking firms, underwriters, accountants, and providers of legal services, in all contracts entered into by the FDIC with public or private sector contractors.

§ 361.2 Policy.

It is the policy of the FDIC that minorities and women and entities owned by minorities and women shall have the maximum practicable opportunity to participate in contracts awarded by the FDIC.

§ 361.3 Definitions.

For the purposes of this part:

(a) *Minority and/or women-owned business* (“MWOB”) means firms at least fifty-one (51) percent owned and controlled by one or more minorities and/or women. In the case of

publicly owned companies, at least fifty-one (51) percent of its voting stock must be owned and controlled by minorities and/or women. Additionally, the management and daily business operations must be controlled by one or more such individuals.

(b) *Joint venture (non-legal services)* means an arrangement in which twenty-five (25) percent or more of the duties are performed by the MWOB and the MWOB is compensated proportionally to its duties. Additionally, twenty-five (25) percent or more of the management and daily business operations must be controlled by such individuals.

(c) *Co-counseling (legal services)* means an association between two or more attorneys or law firms for the joint provision of legal services.

(d) *Legal services* means all services provided by attorneys or law firms (including services of support staff).

(e) *Minority* means any Black American, Native American Indian, Hispanic American, or Asian American.

§ 361.4 Scope.

The MWOP applies to all contracts entered into by the FDIC, whether public or private. The MWOP is incorporated into FDIC policies and guidelines governing contracting and the retention of outside services.

§ 361.5 Oversight and monitoring.

(a) The FDIC Office of Equal Opportunity has overall responsibility for nationwide MWOP oversight, which includes, but is not limited to, the monitoring, review and interpretation of MWOP regulation. In addition, the OEO is responsible for providing the FDIC with technical assistance and guidance to facilitate the identification, registration, and solicitation of minority and women-owned businesses.

(b) Each FDIC office and division that performs contracting or outreach activities shall submit information to the OEO on a quarterly basis, or upon request. Quarterly submissions will include, at a minimum, statistical information on contract awards and solicitations by designated demographic categories and related outreach activities. Additionally, for contracts requiring a subcontracting plan, the prime contractor is required to maintain statistical and outreach data and information regarding the implementation of the subcontracting plan.

§ 361.6 Outreach.

(a) Each regional office and consolidated site including the Legal Division, involved in contracting with the private sector will designate one or more MWOP coordinators. The coordinators will perform outreach activities for the Program and act as liaison between the

FDIC and the public on MWOP issues. On a quarterly basis, or as requested by the OEO, the coordinators will report to the OEO on their implementation of the Program.

(b) Outreach includes the identification and registration of MWOBs who can provide goods and services utilized by the FDIC. This includes distributing information concerning the MWOP and providing appropriate registration materials for use by vendors and/or contractors. The identification of MWOBs will primarily be accomplished by:

(1) Obtaining various lists and directories of minority and women-owned firms maintained by other federal, state and local governmental agencies;

(2) Participating in conventions, seminars and professional meetings compromised of, or attended predominately by, MWOBs;

(3) Conducting seminars, meetings, workshops and other various functions to promote the identification and registration of MWOBs;

(4) Placing MWOP promotional advertisements indicating opportunities with FDIC in minority and women-owned media and,

(5) Monitoring to assure that FDIC staff interfacing with the contracting community are knowledgeable of, and actively promoting, the MWOP.

§ 361.7 Certification.

(a) In order to qualify as MWOB, each vendor or contractor must either:

(1) Self-certify ownership status by completing the appropriate section of the applicable registration form; or

(2) Submit a valid MWOB certification received from a federal agency, designated state or authorized local agency.

(b) Questions regarding minority and/or women ownership status will be resolved by the Division of Administration or, with respect to outside counsel, the FDIC Office of Inspector General, both located at 550 17th Street, NW, Washington, DC 20429.

[57 FR 15004, Apr. 24, 1992, as amended at 60 FR 31384, June 15, 1995]

§ 361.8 Solicitation of non-legal services.

(a) As part of the solicitation process, vendors and contractors, for non-legal services who submit a completed FDIC "Vendor Application," Form #3700/13, will be registered in the National Contractor System (NCS), automated database. The NCS will be available to all FDIC

offices involved in contracting activities. The NCS will be utilized to identify qualified MWOBs for inclusion on bid lists.

(b) To ensure that minority and women-owned firms are being included in each solicitation, the solicitation process will include:

(1) Disseminating procedures and information governing FDIC's solicitation rules and policies to MWOBs;

(2) Providing MWOBs technical guidance in the preparation of proposals;

(3) Allowing qualified MWOBs a 3% price advantage and additional technical considerations for competitively bid services; and

(4) Providing post-award technical guidance to unsuccessful MWOBs.

§ 361.9 MWOB joint ventures.

The FDIC encourages the formation of bona fide joint ventures to assist MWOBs in gaining access to FDIC contracting opportunities.

§ 361.10 Subcontracting.

Consistent with §361.2 of this part, the contractor is required to carry out the FDIC minority and women-owned business contracting policy in the awarding of subcontractors to the fullest extent consistent with the efficient performance of the awarded contract.

§ 361.11 Solicitation and awards for legal services.

(a) The Legal Division engages outside counsel primarily to provide legal services for liquidation, conservatorship and receivership activities. Outside counsel is selected on a competitive basis, as defined in the FDIC "Guide for Outside Counsel", P-2100-002-91 ("Guide"), as amended from time to time.

(b) To be retained as outside counsel, law firms must be free of conflicting interests, unless the Legal Division waives those conflicts in writing. Outside counsel must also enter into a Legal Services Agreement with the FDIC and agree to comply with the provisions of the "Guide".

(c) The Legal Division actively seeks to engage firms owned by minorities and women, both directly and in association with other firms. The Legal Division's Minority and Outreach Office provides assistance to minority and women-owned firms, and to minority and women attorneys within other firms, with respect to registration or other matters relating to the retention of outside counsel.

RETENTION OF MINORITY AND WOMEN PERSONNEL OF MAJORITY LAW FIRMS

It is the FDIC Legal Division's policy affirmatively to seek to retain minorities and women as outside counsel.¹

In addition to engaging minority- and women-owned law firms directly, and as co-counsel with majority firms, the FDIC also seeks to engage the services of minorities and women within majority firms. Accordingly, all FDIC attorneys referring legal matters to outside counsel should give strong consideration to minority or woman partners and associates in majority firms.

A majority firm's minority and women partners and associates authorized for FDIC work are listed in the fee schedule attached to the firm's LSA. This list should be used to facilitate retention of minority partners and associates on FDIC matters. For example, when initially retaining a majority firm, the responsible FDIC staff attorney should take the initiative by asking the firm which of its minority and women partners and associates are available to take responsibility for the matter. The FDIC attorney may then specify that some, most, or all work on the matter be handled by these minorities and women.

Every reasonable effort should be made to become aware of all minority and women personnel of majority firms and to retain them on FDIC matters. To that end, FDIC staff attorneys are encouraged to meet with and get to know the minority and women lawyers working on their matters. Moreover, minority and women personnel at majority firms should be given significant responsibilities – measured both in terms of the type of issue or amount of billings – for the matters referred to their firms.

This directive supplements the Division's October 13, 1992 policy regarding the selection and retention of outside counsel.

December 3, 1992

¹ See 12 C.F.R. § 361.2.

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CO-COUNSEL GUIDELINES FOR MINORITY AND WOMEN OUTREACH PROGRAM

This memorandum establishes the Legal Division's Guidelines to promote co-counseling arrangements between minority- and women-owned law firms and other outside counsel. These Guidelines are effective immediately.

Background

It is the Legal Division's policy affirmatively to seek to retain minority- and women-owned law firms as outside counsel. Although direct referral of work to minority- and women-owned law firms is preferred, co-counsel referrals should be considered if direct referrals are not appropriate because of the inexperience or size of the firm.

Some minority- and women-owned law firms have the skills, but not the personnel resources required, to represent the FDIC, and others do not have the relevant experience in complex commercial litigation and transactions common to FDIC representation. Co-counsel arrangements can facilitate referrals to minority- and women-owned law firms by allowing them to develop new areas of expertise that will enable them ultimately to receive direct referrals of FDIC matters.

Additionally, participation by a firm subject to the Division's Cap Policy (Policy No. 91-1) in a co-counsel arrangement with a minority- or women-owned law firm should be considered a significant factor in determining whether to grant a waiver of the Cap Policy.

Guidelines

Combining Resources. A co-counsel referral is intended to combine the resources of two or more outside law firms to work under the close supervision of an FDIC Legal Division attorney (Supervising Attorney).

Requirements for Co-counsel Referrals. All participants in any co-counsel arrangement must have a current Legal Services Agreement (LSA) with the FDIC, and must certify that their arrangement complies with these Guidelines. In the event of a conflict between the terms of an outside counsel's LSA and any co-counsel arrangement, the terms of the LSA shall govern.

Allocation of Work. Upon commencement of a co-counsel referral, the participants, in consultation with the FDIC's Supervising Attorney, should develop a case plan for managing the assignment and describing the allocation of work between each participant, which shall be subject to approval by the FDIC's Supervising Attorney before any substantial work is commenced. The case plan should ensure significant participation by the minority- or women-owned law firm in substantive legal matters. Generally, and particularly for purpose

of a requested waiver of the Cap Policy, the minority- or women-owned law firm participant should be responsible for at least 20% of the work. Participants in a co-counsel referral also should provide the FDIC's Supervising Attorney with a combined budget and staffing plan for the engagement, including an estimate of the percentage of work anticipated by each participant.

Responsibilities of Participants. Generally, one co-counsel participant would not be liable for the actions of any other participant in a co-counsel arrangement. However, if any participant believes that any action by another participant may constitute malpractice, breach of any ethical standards of conduct, or otherwise may affect adversely the interests of the FDIC, it promptly shall so inform the FDIC's Supervising Attorney.

Duplicate Billing. The FDIC does not pay for duplication of effort or inefficiencies arising from co-counsel arrangements. Co-counsel participants therefore are expected carefully to divide and assign tasks to avoid duplicate work and billings. Each participant is required to bill separately for its work in accordance with applicable Legal Division billing procedures.

Disputes Between Co-Counsel. Outside Counsel in co-counsel arrangements should inform the FDIC's Supervising Attorney promptly of any dispute or disagreement with its co-counsel participant(s) pertaining to the representation. If the Legal Division determines that any such dispute may affect adversely the interests of the FDIC, it may require one or more of the participants to withdraw from the representation.

Review of Co-Counsel Referrals. The FDIC Legal Division's Outside Counsel Section periodically will review individual co-counsel arrangements to determine compliance with these Guidelines.

June 7, 1993

ENCOURAGING COMPETITION AMONG OUTSIDE COUNSEL

This memorandum establishes the Legal Division's policy and procedures for encouraging competition among law firms who seek to represent the FDIC ("outside counsel"). The purpose of the policy is to obtain for the FDIC the best possible legal services for the lowest available cost. The policy applies to all Sections of the Legal Division which retain outside counsel and replaces all previous directives on the subject.

When seeking to retain outside counsel, staff should consider alternative billing arrangements whenever possible, including fixed fees and contingency fees. Nevertheless, for some matters it will be clear from the outset that there will be no cost savings available from alternative arrangements. For other matters, external demands will make it impossible to devote the time necessary to negotiate such alternatives. Where, however, it is both economical and feasible every effort should be made to negotiate alternative billing arrangements.

Each alternative billing proposal should be scrutinized for its potential to provide an incentive for the firm to minimize costs and maximize recoveries, in a timely fashion, to the FDIC. It is critical that staff and outside counsel have the same understanding of what is necessary to accomplish the goals of the retention. Therefore, firms wishing to propose alternatives to hourly billing should do so in objective terms (i.e., in dollars, time or measurable quality).

All alternative billing arrangements must be memorialized in writing before the firm is retained and a copy of the approved agreement, as described below, submitted to the Outside Counsel Section within 10 days. Outside counsel must be made aware that, in all alternative billing arrangements, the *gross* amount of any recovery must be directed to the FDIC. The FDIC will reimburse the agreed upon fee when presented with the firm's bill.

Fixed Fees

Set pricing and volume discounts should be considered for routine matters, such as unlawful detainer, foreclosures, evictions, conveyances, routine collections, default judgments, bankruptcy proofs of claim, and relief from stays.

The following procedures should be used to set fixed fees. Within 60 days of this memorandum, each Branch within the Division will determine whether and in what subject matter areas fixed fees are appropriate. Those sections and regions that are designated to employ fixed fees will draft fixed fee schedules within a reasonable amount of time, as determined by their respective Deputy General Counsel. These schedules should reflect the range of fees applicable to each geographic area and for each type of matter within the particular region's or section's jurisdiction. All schedules must be reviewed and approved by the appropriate Associate General Counsel or Assistant General Counsel, whichever is the

highest ranking official. Staff attorneys shall agree to rates not higher than those reflected in these approved schedules when negotiating fixed fee arrangements with outside counsel.

All fixed fee schedules must be reviewed within the first quarter of each calendar year and adjusted as necessary to reflect market conditions with respect to the type of matter authorized and the amount of fee fixed for each type. The Associate or Assistant General Counsel, as appropriate, has discretion to determine the process by which the section's or region's schedule of fixed fees will be reviewed annually, but must approve any revisions no later than the end of the second quarter.

Setting a fixed fee other than those listed on the authorized, fixed fee schedule constitutes an amendment to the Legal Services Agreement and is governed by the May 18, 1992 Master Delegations of Authority for the Legal Division.

Contingency Fees

Traditional contingency fee arrangements -- e.g., payment based upon a percentage of the amount collected -- may be a preferred method of payment for some matters, such as certain types of collections. In addition, staff are encouraged to use a modified form of contingency fee to prompt early settlement or other resolution. For example, a cap could be placed on discounted hourly-fee totals in combination with a percentage of recovery achieved by settlement. This minimizes the expense of legal services, especially litigation costs, and takes advantage of the present value of funds. Moreover, the FDIC is willing to consider "sliding contingency fees" where the amount of the contingent fee declines as the amount of recovery increases. For example, the contingency agreement could provide a 20% fee on a \$2,000 dollar recovery; 18% on the next \$3,000; and 14% on any additional amounts recovered. Of course, if the matter is such that the difficulty in recovery increases over time, the percentages could be reversed as an incentive to obtain full recovery.

Because of their size, minority and women-owned firms are sometimes unable to carry the costs of representation until payment of the contingency fee. Therefore, particular care should be taken to consider adaptations of traditional contingency fee arrangements to ensure maximum participation by minority and women-owned law firms in matters referred on a contingency fee basis. For example, the time charges paid the firm could be discounted by 50% and some portion of the discount made contingent upon ultimate recovery in the matter. Moreover, the agreement could provide for recoupment of increasing amounts of the discount as settlements are reached, while capping the amount of fees paid to the firm prior to receipt of actual dollars by the FDIC.

All of these arrangements require the staff attorney to assess accurately the value of the matter and to ensure that the terms of the fee agreement provide the FDIC cost effective legal services. Generally, however, these arrangements are not appropriate where there are minimal risks to recovery of a large judgment. Consequently, they usually are not

appropriate in director and officer or professional liability litigation. Alternative billing arrangements may be appropriate, however, for pursuit of narrow bond or other insurance claims. Moreover, these arrangements may not be appropriate for marketing and resolving the failed or failing institution itself.

Where contingency fees are deemed an economical alternative to hourly billing, the delegations to approve such arrangements are as follows: With respect to the Liquidations Branch, the Managing Attorney must approve arrangements paying up to 25% of recovery and the Regional Counsel must approve arrangements paying up to 33% of recovery. For Liquidation Branch contingency fee arrangements in excess of 33% of recovery and for all contingency fee arrangements proposed by any other Branch, the respective Associate General Counsel's approval is required.

April 20, 1993

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**STATEMENT OF POLICY AND PROCEDURES
CONCERNING LIMITATIONS ON FEE PAYMENTS
TO OUTSIDE COUNSEL (Fee Cap Policy)**

To be effective January 1, 1996, this Statement sets forth the policy and procedures of the FDIC Legal Division (the "Division") to limit generally the payment of fees to any particular outside counsel under consideration for engagement while at the same time ensuring quality, cost-effective representation of the FDIC.

Policy Objective. It is the objective of the Legal Division always to retain well-qualified, ethical outside counsel to provide legal services to the FDIC. The Division expects to obtain efficient and economical legal services from its outside counsel, and to benefit from enhanced competition among firms. The Division seeks to avoid unwarranted concentrations of legal referrals. Certain firms, however, may be better able than others because of their experience to offer special or unique expertise. Under those circumstances, the Division reasonably may anticipate savings and other benefits from engaging such firms.

1. Approvals Required. In deciding which firms to engage, it is the expectation of the Division that, under most circumstances, referrals of new matters should not be made to any law firm (including all offices of multi-office firms) that has received during the previous four calendar quarters aggregate legal fees (exclusive of expenses) from the BIF, FRF, SAIF and RTC funds, including payments made through asset servicers, conservatorships, and bridge banks, in excess of:

- (a) \$2.5 million (but less than \$5 million) without the prior written approval of a Deputy General Counsel or Regional Counsel;
- (b) \$5 million (but less than \$7.5 million) without the prior written approval of a Deputy General Counsel; or
- (c) \$7.5 million without the prior written approval of the General Counsel.

2. Fee Information Reports. The Division's Outside Counsel Section ("OCS") will prepare and distribute throughout the Division quarterly reports concerning the amount of fees paid to outside counsel during the previous four calendar quarters. Legal Division personnel shall not refer new matters to any firm that, according to the most recent quarterly report, received aggregate fee payments in excess of the levels shown above, except with the indicated approvals.

3. Criteria for Approvals. Criteria to be considered for approving referrals of new matters pursuant to paragraph 1 include, but are not limited to, the following: (a) special expertise or experience in complex or factually or legally similar matters; (b) justifiable expectation of substantially reduced fees (reflecting lower rates or less time) compared with other available firms; (c) reasonable expectation of substantially better or enhanced legal services and advice;

(d) demonstrated greater experience in dealing with the Division's "special issues" or other sensitive matters; (e) promotion of the Division's minority and women outreach program; and (f) exigent circumstances.

4. **Documentation.** All requests for waivers pursuant to paragraph 1 shall be made in writing with a copy forwarded promptly to OCS by the requestor. All approvals shall set forth in reasonable detail the justification for the approval. Reviewing officials within the Legal Division shall promptly transmit a copy of each request for a waiver, reflecting final action, to OCS.

5. **FRF Payments to Acquirers under FSLIC Assistance Agreements.** Legal fees reimbursed by the FRF to acquirers under FSLIC Assistance Agreements are not considered in "fee cap" calculations. The primary reason for their exclusion is the lack of privity of contract between the Division and the pertinent outside counsel. Moreover, these costs are not budgeted by the Division as legal fees, but are budgeted and paid by the Division of Resolutions, as an element of expense under the assistance agreements. However, legal fees incurred directly on behalf of the FRF (e.g., for representation of the FRF in legal proceedings initiated by assisted acquirers) shall be subject to this Statement of Policy and Procedures.

6. **Effective Date.** This Statement of Policy and Procedures is effective January 1, 1996.

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